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FILED
AUG 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1312

In the Supreme Court of the United States

BOZO KELAVA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the repeal of discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) for aliens who have engaged in terrorist activity applies to an alien whose terrorist activity predated the repeal.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-11a) is reported at 434 F.3d 1120. The order of the Board of Immigration Appeals (Pet. App. 12a-16a) and the decision of the immigration judge (Pet. App. 20a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2006. A petition for rehearing was denied on January 12, 2006 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 12, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed

Supp. II 1996), authorized a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990 (IMMACT), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien who has engaged in "terrorist activities." Pub. L. No. 101-649, §§ 601(a), 601(d)(1), 104 Stat. 5067, 5075-5076; see 8 U.S.C. 1182(a)(3)(B) (Supp. II 1990); 8 U.S.C. 1182(c) (Supp. II 1990). In 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by IMMACT, Section 240A precludes from eligibility for discretionary relief any alien who has engaged in terrorist activity. See 8 U.S.C. 1227(a)(4)(B) (2000 & Supp. IV 2004); 8 U.S.C. 1229b(c)(4).[1]

IIRIRA also precluded from eligibility for discretionary relief from removal any alien convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of nonretroactivity, that IIRIRA's repeal of discretionary relief for aggravated felons should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement if, at the time of the plea

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[1] "Terrorist activity" is defined as "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person * * * to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained." 8 U.S.C. 1182(a)(3)(B)(ii)(II).

agreement, the conviction would not have rendered the alien ineligible for discretionary relief. 533 U.S. at 314-326.

2. In 1969, petitioner, an anti-communist dissident, came to the United States as a refugee from the Croatian region of the former Yugoslavia. In 1972, petitioner became a lawful permanent resident. Pet. App. 2a.

In the late 1970s, the Federal Republic of Germany began deporting and extraditing Croatian dissidents to Yugoslavia, where they allegedly were tortured and executed. In April 1978, petitioner and an accomplice, armed with handguns, ropes, and a phony bomb, entered the West German Consulate in Chicago, seized several employees, and demanded that West Germany decline to extradite Stepan Bilandzic, a prominent Croatian dissident, to Yugoslavia. Petitioner and his accomplice later released the hostages after being permitted to speak with Bilandzic. Pet. App. 2a-3a.

Petitioner and his accomplice were indicted and convicted in federal court of conspiracy and kidnapping of foreign officials. The district court, however, ordered a new trial on the basis that it had erred in instructing the jury. After the government obtained a new indictment charging petitioner and his accomplice with armed imprisonment, the United States Court of Appeals for the Seventh Circuit determined that the defendants could be retried only for simple (unarmed) imprisonment, the lesser included offense of the original kidnapping charge. In January 1980, petitioner pleaded guilty to one count of unarmed imprisonment of a foreign national, and was sentenced to two and one-half years in prison. Pet. App. 3a.

3. In May 1999, the government charged petitioner with being removable based on his having been convicted of an aggravated felony, see 8 U.S.C. 1227(a)(2)(A)(iii). In June 2000, the government amended its charge to allege that petitioner was also (and independently) removable based on his having engaged in terrorist activity, see 8 U.S.C. 1227(a)(4)(B). Pet. App. 3a, 21a.

The immigration judge (IJ) determined that petitioner was removable both because he had been convicted of an aggravated felony and because he had engaged in terrorist activity. Pet. App. 17a-33a. The IJ also found that petitioner was ineligible for discretionary relief under former Section 212(c). Pet. App. 3a-4a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal, concluding that petitioner was removable because he had engaged in terrorist activity and that he was ineligible for discretionary relief under former Section 212(c). Pet. App. 12a-16a. Because the Board found that petitioner was removable for having engaged in terrorist activity, the Board did not address whether petitioner was also removable based on his conviction of an aggravated felony. *Id.* at 15a.

4. Petitioner filed a petition for review in the court of appeals, which the court denied. Pet. App. 1a-11a. Petitioner, relying on principles of non-retroactivity as applied in *INS* v. *St. Cyr*, *supra*, argued that, because he had pleaded guilty to unarmed imprisonment in 1980 at a time when his conviction did not render him ineligible for discretionary relief, IIRIRA's subsequent repeal of discretionary relief for aliens who have engaged in terrorist activity should be construed not to apply to him. The court of appeals rejected petitioner's argument, concluding that the repeal of discretionary relief had no

retroactive effect in petitioner's circumstances. Pet. App. 5a-11a.

The court explained that petitioner's circumstances differed materially from those at issue in *St. Cyr*. In *St. Cyr*, because the relevant statute precluded discretionary relief for any alien convicted of an aggravated felony, a "guilty plea supplied the conviction necessary for removal." Pet. App. 7a. Petitioner's ineligibility for discretionary relief, by contrast, "does not hinge on a 'conviction,'" because his ineligibility results from his having "engaged in" terrorist activity, not on his having been "convicted of" engaging in terrorist activity. *Ibid.* (citing 8 U.S.C. 1227(a)(4)(B)). The court explained that petitioner thus "is undisputedly removable based on his actions in 1978, regardless of his later decision to plead guilty." *Ibid.*

The court reasoned that *St. Cyr* therefore did not assist petitioner. That decision, the court explained, was grounded in the belief that an alien's decision to plead guilty to an aggravated felony before IIRIRA would have been made in "reliance on existing law," under which conviction of an aggravated felony did not categorically render the alien ineligible for discretionary relief. Pet. App. 7a; see *St. Cyr*, 533 U.S. at 325 (observing that aliens "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial"). By contrast, petitioner, "in order to demonstrate reliance or any sort of 'settled expectations' on the existing immigration laws," would be required "to assert that he would not have committed the terrorist activity in 1978 if he had known that he might become ineligible for discretionary relief from removal." Pet. App. 8a. The court dismissed any such assertion, relying on its own decisions and deci-

sions of other courts of appeals that had "pointed out the absurdity of arguing that one would not have committed a crime in the first place * * * if he had known he could not [then] ask for" discretionary relief. *Ibid.*[2]

Finally, the court rejected petitioner's reliance on *Clark* v. *Martinez*, 543 U.S. 371 (2005). The court observed that, in *Clark*, this Court held that the interpretation of 8 U.S.C. 1231(a)(6) adopted in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), with respect to one group of aliens addressed by that provision, also governed the interpretation of the provision with respect to another groups of aliens addressed by it. The court of appeals reasoned that the "retroactivity analysis employed in *St. Cyr* [is] a different animal" from the question of statutory interpretation at issue in *Clark*, because "applying a new provision may have a precluded retroactive effect as to one group but not to another." Pet. App. 9a. The court therefore concluded that the repeal of former Section 212(c) may have a retroactive effect in the case of certain aliens and thus be construed not to apply to those aliens, but have no retroactive effect in the case of other aliens, like petitioner, who lack "the same sort of reasonable, settled expectations." *Id.* at 10a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

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[2] Because the court concluded that applying IIRIRA's repeal of discretionary relief to petitioner had no retroactive effect, the court found no need to consider the applicability to petitioner of IMMACT's previous elimination of Section 212(c) relief for aliens who have engaged in terrorist activity (see p. 2, *supra*). Pet. App. 7a n.6.

1. The court of appeals correctly concluded that IIRIRA's repeal of discretionary relief for aliens who have engaged in terrorist activity applies to an alien whose terrorist activity predated IIRIRA, and that petitioner therefore is ineligible for discretionary relief. This Court has established that the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)); see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2428 (2006). The analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270).

The Court applied those principles in *St. Cyr*. There, the Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under the amended provision. See 533 U.S. at 293, 321-324. The Court observed that "preserving the possibility of [discretionary] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, and that aliens who pleaded guilty "almost certainly relied upon [the] likelihood of" obtaining such relief "in deciding whether to forgo their right to a trial," *id.* at 325. In those circumstances in which the prosecutor received the benefit of a plea agreement that

was likely facilitated by the alien's belief that he would be eligible for Section 212(c) relief, the Court concluded that considerations of fair notice, reasonable reliance, and settled expectations indicated that the repeal of Section 212(c) had a retroactive effect. *Id.* at 323-324.

St. Cyr thus was grounded in the notion that, because aliens would have based their decision to plead guilty on the continued availability of discretionary relief, the plea of guilty gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. The "possible discretionary relief," in short, was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement". *Fernandez-Vargas*, 126 S. Ct. at 2432 & n.10 (citing *St. Cyr*, 533 U.S. at 323).

As the court of appeals explained, Pet. App. 5a-8a, neither *St. Cyr* nor the controlling "considerations of fair notice, reasonable reliance, and settled expectations," *Martin*, 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270), suggest that IIRIRA's elimination of discretionary relief for aliens who have engaged in terrorist activity has a retroactive effect in the case of an alien whose terrorist activity predated IIRIRA. Whereas the Court in *St. Cyr* concluded that aliens would have relied on the availability of discretionary relief in deciding to plead guilty to an aggravated felony, there is no basis for supposing that an alien's decision to engage in terrorist activity could have been made in reliance on the availability of discretionary relief, or that such an alien could be considered to have settled expectations in the availability of discretionary relief. See Pet. App. 7a-8a.

Indeed, the courts of appeals have uniformly rejected the notion that IIRIRA's repeal of discretionary relief for aggravated felons could raise retroactivity concerns

merely because an alien *committed* (as opposed to pleaded guilty to) an aggravated felony before IIRIRA. See *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 519-520 (5th Cir. 2006), petition for cert. pending, No. 05-1251 (filed Mar. 28, 2006); *Evangelista* v. *Ashcroft*, 359 F.3d 145, 154-156 (2d Cir. 2004), cert. denied, 543 U.S. 1145 (2005); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See also *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam) (reaching that conclusion with respect to limitations on availability of discretionary relief for aggravated felons enacted by Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), 110 Stat. 1277), cert. denied, 539 U.S. 926 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (same), cert. denied, 539 U.S. 902 (2003); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998) (same), cert. denied, 528 U.S. 1153 (2000). Those courts have reasoned that "it would border on the absurd to suppose that an alien might have been deterred from committing a crime had he known that, in addition to the prospect of imprisonment and deportation following release, he could not ask for discretionary relief from deportation." *Khan* v. *Ashcroft*, 352 F.3d 521, 524 (2d Cir. 2003) (alteration, citation, and internal quotation marks omitted); see *LaGuerre*, 164 F.3d at 1041. The same conclusion follows in this case with respect to petitioner's contention that applying IIRIRA's elimination of discretionary relief for aliens who have engaged in terrorist activity would have a retroactive effect in the case of an alien who engaged in such activity before IIRIRA.

2. There is no merit to petitioner's contention (Pet. 10-16) that the court of appeals' decision conflicts with *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), and

Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004). *Olatunji* did not address the repeal of eligibility for discretionary relief for aliens who have engaged in terrorist activity, or address more generally any issues concerning elimination of eligibility for discretionary relief from removal. The case instead addressed a separate provision enacted by IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), that provides that a lawful permanent resident who travels outside the United States will not be regarded as seeking admission upon his return unless he has been convicted of certain qualifying crimes. The Fourth Circuit held that that provision has a retroactive effect as applied to an alien who had pleaded guilty to a qualifying crime before IIRIRA. 387 F.3d at 388-398. The court reached that conclusion on the basis that the provision had "attached new legal consequences to [the alien's] decision to plead guilty." *Id.* at 396. In this case, by contrast, petitioner's ineligibility for discretionary relief does not result from his "decision to plead guilty," but instead results from his having previously engaged in terrorist activity. See pp. 8-9, *supra*. That distinction, as the court of appeals correctly explained, is pivotal. See Pet. App. 7a-8a.

In *Ponnapula*, the Third Circuit considered whether IIRIRA's elimination of discretionary relief for aggravated felons is retroactive as applied to an alien who was tried and found guilty of an aggravated felony before IIRIRA. The court concluded that *St. Cyr*'s holding concerning aliens who pleaded guilty to an aggravated felony before IIRIRA also applied to aliens "who affirmatively turned down a plea agreement" and went to trial. 373 F.3d at 494. The court reasoned that such aliens "had a reliance interest in the potential availability of [discretionary] relief" because eligibility for relief

"would so obviously factor into [their] decision-making" in electing to go to trial. *Ibid.* That holding has no relevance here for essentially the same reason that the Fourth Circuit's decision in *Olatunji* fails to assist petitioner: Petitioner's ineligibility for discretionary relief does not result from his conviction for engaging in terrorist activity, but instead results from his having engaged in such activity.

Petitioner asserts (Pet. 10-16) that the decision below conflicts with *Olatunji* and *Ponnapula* on the abstract question of whether reliance is a necessary precondition to establishing that a statute's application has a retroactive effect. There is no reason to grant review to consider that issue.

As an initial matter, this Court has made clear that retroactivity analysis is informed by "considerations of fair notice, *reasonable reliance*, and settled expectations,'" *Martin*, 527 U.S. at 358 (emphasis added) (quoting *Landgraf*, 511 U.S. at 270), and the Court subsequently reaffirmed the significance of distinct reliance interests—or the absense thereof—in *St. Cyr* and *Fernandez-Vargas* in determining whether application of a provision of IIRIRA would be retroactive. See p. 7-8, *supra*. Consistent with these decisions, the Third Circuit in *Ponnapula*, while rejecting the suggestion that a particular alien must demonstrate "actual [i.e. subjective] reliance" on the pre-existing law, see 373 F.3d at 490-493, grounded its holding in its conclusion that aliens who declined a plea agreement and went to trial "did so in *reasonable reliance* on the availability of [discretionary] relief," *id.* at 494 (emphasis added). And although the Fourth Circuit in *Olatunji* indicated in dictum that "reliance, in any form, is irrelevant to the retroactivity inquiry," that decision preceeded this Court's

decision in *Fernandez-Vargas*, which confirmed that reliance interests are relevant to the inquiry. Moreover, the Fourth Circuit further observed in *Olatunji*, that "[t]o the extent that [reliance] could or should be understood as required," the court "would insist at most upon objectively reasonable reliance." 387 F.3d at 396. The court then explained that reasonable reliance existed in the circumstances of that case. *Id.* at 397.

At any rate, even if dictum in either *Ponnapula* or *Olatunji* could be said to suggest a different understanding from that of the court of appeals below on the precise role of reliance considerations in retroactivity analysis, there is no indication that any such difference in understanding would lead to a different outcome in the circumstances of this case. To the contrary, the Fourth Circuit has held that IIRIRA's repeal of discretionary relief for aggravated felons has no retroactive effect as applied to aliens who, before IIRIRA, had committed an aggravated felony and been convicted at trial. *Chambers*, 307 F.3d at 284. The Third Circuit, in *Ponnapula*, observed that it "highly doubt[ed]" that aliens who went to trial on an aggravated felony before IIRIRA, but had been offered no plea agreement, could assert "a reliance interest that renders IIRIRA's repeal of [discretionary relief] impermissibly retroactive as to them." 373 F.3d at 494. The Fourth Circuit thus has agreed, and the Third Circuit presumably would agree, with the uniform conclusion of courts of appeals that IIRIRA's elimination of discretionary relief for aggravated felons has no retroactive effect merely because an alien's aggravated felony was committed before IIRIRA. See pp. 8-9, *supra*. The Third and Fourth Circuits therefore would also conclude, in agreement with the court of appeals below, that IIRIRA's elimination of

discretionary relief for aliens who have engaged in terrorist activity has no retroactive effect as applied to an alien whose terrorist activity predated IIRIRA.

3. Petitioner contends (Pet. 23-26) that the court of appeals' decision conflicts with this Court's decision in *Clark* v. *Martinez*, 543 U.S. 371 (2005). That claim lacks merit and does not warrant review.

In *Clark*, this Court considered the proper interpretation of 8 U.S.C. 1231(a)(6), which authorizes detention "beyond the removal period" in the case of certain categories of aliens, including (i) aliens who are removable based on their having committed certain crimes, and (ii) aliens who are inadmissible under 8 U.S.C. 1182. The Court explained that, in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), it had previously construed Section 1231(a)(6) to authorize continued detention of aliens in the first category only as long as reasonably necessary to effectuate the aliens' removal. See *Clark*, 543 U.S. at 377. The Court concluded that the construction of that provision adopted in *Zadvydas* with respect to aliens in the first category was also controlling with respect to aliens in the second category. *Id.* at 378.

Petitioner contends that the court of appeals' decision conflicts with the interpretive approach followed in *Clark* because, under the court of appeals' approach, IIRIRA's repeal of discretionary relief from removal applies to certain categories of aliens (such as petitioner) but does not apply to other categories of aliens (such as the aliens considered in *St. Cyr*). In petitioner's view, that result is inconsistent with *Clark* because it "give[s] the same statutory text a different meaning depending on the party before the court." Pet. 24.

Petitioner's argument reflects a fundamental misunderstanding of this Court's retroactivity decisions. The

entire premise of the presumption against retroactivity is that a statutory amendment will be construed to apply to certain categories of affected persons but not to others—*viz.*, that the new provision will be construed to apply to persons as to whom its application would produce no retroactive effect, but will be construed not to apply to persons as to whom there would be a retroactive effect. See, *e.g.*, *Martin* v. *Hadix*, 527 U.S. 343 (1999) (concluding that limitations on hourly rate for attorney's fee awards enacted by Prison Litigation Reform Act of 1996 (PLRA), 42 U.S.C. 1997e(d)(3), have retroactive effect and thus do not apply to pre-PLRA attorney work, but have no retroactive effect and thus do apply to post-PLRA attorney work even in cases initiated before PLRA's enactment). See also *Fernandez-Vargas*, 126 S. Ct. at 2428 (explaining that, if "applying the statute *to the person objecting* would have a retroactive consequence," then "presumption against retroactivity" results in "construing the statute as inapplicable *to the event or act in question*") (emphasis added). Nothing in this Court's decision in *Clark*—which raised or addressed no questions of retroactivity—calls into question that established feature of retroactivity analysis.[3]

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[3] There is no reason to grant the petition, vacate the judgment below, and remand the case for further consideration in light of this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. at 2422. See Pet. 22-23. In *Fernandez-Vargas*, this Court considered a retroactivity claim concerning the application of a separate provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), which renders ineligible for discretionary relief from removal any alien who has reentered the country illegally after having previously been removed. The Court held that the provision's elimination of eligibility for discretionary relief produces no retroactive effect when applied to an alien whose illegal reentry predated IIRIRA's effective date. See 126 S. Ct. at 2431-2434. Nothing in the Court's opinion in *Fernandez-Vargas* casts doubt on the court of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2006

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appeals' conclusion below that IIRIRA's elimination of eligibility for discretionary relief for aliens who have engaged in terrorist activity similarly has no retroactive effect as applied to aliens whose terrorist activity predated IIRIRA. To the contrary, the Court's holding and analysis in *Fernandez-Vargas* is fully consistent with that of the court of appeals below.